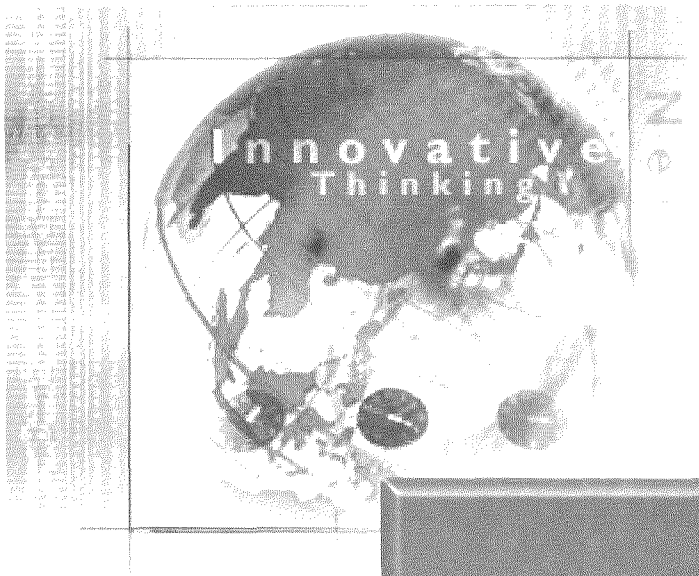

Qwest 271 III

AT&T Presentation

11/25/02

AT&T

FAILURE TO PROVIDE NONDISCRIMINATORY ACCESS TO LOOP QUALIFICATION INFORMATION

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NONDISCRIMINATORY ACCESS TO LOOP QUALIFICATION INFORMATION: A CHECKLIST REQUIREMENT

- Checklist Item 2: Qwest must provide nondiscriminatory access to OSS.
- Nondiscriminatory Access to OSS means that Qwest must provide competitors with access to *all* loop qualification information "that it has in any of its own databases or internal records." [Mass. 271 Order ¶ 54]
- "[T]he Commission requires incumbent carriers to provide competitors access to all of the same detailed information about the loop that is available to the incumbents." [*Vermont 271 Order* ¶ 35]

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WHAT IS LOOP QUALIFICATION INFORMATION?

- "Loop qualification information identifies the physical attributes of the loop plant." [*UNE Remand Order* ¶ 426]
- Mechanized Loop Testing (or "MLT") provides information about the electrical parameters of a loop and is plainly loop qualification information.
  - "At a minimum, a BOC must provide . . . the electrical parameters of the loop, which may determine the suitability of the loop for various technologies." [*Vermont 271 Order* at n. 106]

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THE CHECKLIST OBLIGATION TO PROVIDE LOOP QUALIFICATION INFORMATION IS UNAMBIGUOUS AND UNQUALIFIED

- "[A]t a minimum, incumbent LECs must provide requesting carriers the same underlying information that the incumbent LEC has in *any* of its own databases of other internal records." [*UNE Remand Order* ¶ 427]
- "The Commission's rules require BellSouth to provide competitors with access to all loop qualification information in its databases." *Alabama 271 Order at n. 483.*
- The obligation to provide line provisioning data extends to data that "exists anywhere in a BOC's back office and can be access by any of a BOC's personnel." [*Vermont 271 Order* ¶ 35]
- "[A] BOC must also provide access for competing carriers to the loop qualifying information that the BOC can itself access manually or electronically." [*Vermont 271 Order* ¶ 35]
- "The relevant inquiry . . . is not whether Verizon's retail arm or advanced services affiliate has access to such underlying information but whether such information exists anywhere in the [the incumbent's] back office and can be accessed by any of [the incumbent's personnel." [Mass. 271 Order ¶ 54]
- "[A] BOC may not filter or digest the underlying information and may not provide only information that is useful in provision of a particular type of xDSL that a BOC offers." [*Vermont 271 Order* ¶ 35]

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QWEST HAS CONCEDED THE FACTS THAT ESTABLISH A CHECKLIST VIOLATION

- Qwest acknowledges that:
  - It runs MLT tests that it had not previously disclosed.
  - The MLTs return information about the physical attributes of loops.
  - Qwest retains that information in its internal databases.
  - That information is available to some Qwest employees, but is not available to CLECs.

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QWEST'S EXCUSES DO NOT WITHSTAND SCRUTINY

- Qwest's claim that it is entitled to withhold MLT data because it is not obtained at the pre-order state must be rejected.
  - The Commission's rules are clear that loop qualification information consists of **any** information that Qwest obtains regarding the properties of the loop that can be used to determine if the loop is capable of supporting advanced services.
    - Qwest concedes that it performs MLTs to "ensure that Qwest was able to provide a loop which met all technical specifications to the CLEC on the CLEC's requested due date."
    - Once an MLT is run at any stage, that information remains available to Qwest (e.g., for winback purposes) but not to CLECs.

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QWEST'S EXCUSES DO NOT WITHSTAND SCRUTINY

- Qwest claims that CLECs do not need access to Qwest's MLT results, because the information it does provide to CLECs is adequate is both false and irrelevant.
  - In reality, the databases that Qwest provides to CLECs indisputably provide only historical information (which is, particularly in the Qwest region, notoriously inaccurate). By contrast, the MLT test shows the actual and current characteristics for the loop as of the date of test (*i.e.*, just before the loop is provisioned).
  - MLT is the only tool that examines the actual and current loop status, and it returns a host of useful electrical parameters that are not available in the databases that Qwest makes available to CLECs.
  - In any event, to the extent that certain types of loop information that MLT provides are similar in some respects to types of information provided by other Qwest databases, Qwest is not entitled to withhold relevant loop qualification information based on Qwest's unilateral determination that the MLT information at issue would be of no use to CLECs.
- The bottom line is that the *competing carrier* must be allowed to "make an independent judgement . . . about whether an end user loop is capable of supporting the advanced services equipment the competing carrier needs to install." [*Vermont 271 Order* ¶ 35]

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QWEST'S EXCUSES DO NOT WITHSTAND SCRUTINY

- Qwest's claim that its retail representatives do not use MLTs, even if true, is irrelevant.
  - "The relevant inquiry . . . is not whether Verizon's retail arm or advanced services affiliate has access to such underlying information but whether such information exists anywhere in the [the incumbent's] back office and can be accessed by any of [the incumbent's personnel." [Mass. 271 Order ¶ 54]

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FAILURE TO COMPLY WITH SECTION 272

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Background: Qwest I & II

- In the last proceeding, it became clear that Qwest could not satisfy the "crucially important" 272 safeguards. [*Texas 271 Order* ¶ 395]
  - Qwest's underlying accounting polices were flawed
  - Qwest had inadequate controls in place
- These problems were not limited to the 272 affiliate QCC: QC (the BOC) and QCII (the holding company) also could not certify their books as GAAP-compliant

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The New Application

- What has changed since Qwest I & II?
  - Qwest's accounting policies are still under review
  - Qwest still has not put in place effective and tested controls
  - Qwest continues to uncover accounting violations
    - *E.g.*, On November 15, Qwest revealed that it misclassified costs associated with designing, deploying and testing network facilities
  - Qwest continues to acknowledge that it cannot say when its internal investigation will be complete

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Qwest's "Fix" Is A Sham

- Qwest says all of these problems can be ignored because QLDC is a "new" company with clean books. **But:**
  - QLDC is a paper company without significant assets or employees.
  - QLDC is a Trojan Horse.
    - Qwest concedes that QLDC will be scrapped as soon as Qwest can claim that QCC's accounting problems have been "fixed."
- It cannot seriously be argued that QLDC has the ability to provide LD services in 9 states to millions of customers.
- QLDC also does not have contracts in place with the BOC (QC) that would allow it to provide LD service.
  - Qwest, however, says that the FCC cannot see any of the chain deals between intermediate affiliates and the BOC.

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Qwest's "Fix" Is A Sham

- Section 272 requires a BOC to "provide" in-region interLATA services through a separate affiliate that complies with all the substantive requirements of sections 272(b)-(e). The Commission has repeatedly held that "provide" must be construed broadly in light of the core "statutory purpose" of sections 271 and 272.
  [*Qwest Teaming Order* ¶¶ 28-37]
- The courts and the Commission have repeatedly held that form must be disregarded for substance and the focus must be on economic reality.
- The reality here is that the entities other than QLDC will be "providing" LD because QLDC is an empty vessel.
- Qwest's construction would defeat the core purposes of 272. The entities actually "providing" LD would would not need to satisfy section 272's accounting and structural safeguards.

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QLDC Cannot Satisfy Section 272

- In all events, even if it could be assumed that QLDC was the only relevant entity for section 272 purposes, Qwest fails to satisfy section 272.
- Qwest tries to make a virtue out of the fact that QLDC was cobbled together in only a few weeks. But the Commission has repeatedly held that the strongest evidence of going-forward compliance with section 272 is a history of compliance with section 272.
- Qwest cannot have it both ways. If QLDC is truly new, then it has no demonstrated history of compliance with section 272. And to the extent that QLDC is a successor to QCC and is judged by that entity's past, only one conclusion could withstand appellate review – that QLDC would *not* abide by section 272's safeguards.
- Merely finding that Qwest will someday in the future come into compliance with section 272 could not justify approval.
  - Sections 271 and 272 require the BOC to be in compliance with section 272 at the time that it begins to provide LD service and to demonstrate with reasonable certainty that it will remain in compliance.
  - The Commission held that such "paper promises" of future compliance are insufficient.

AT&T

QLDC Cannot Satisfy Section 272

- The sum total of Qwest's "analysis" and "evidence" of why the accounting problems that are known to plague the Qwest family cannot be considered to impact QLDC is the following:
  - "The policies and practices related to the accounting transactions currently under review by management and KPMG LLP for potential restatement have not been and are not applied to QLDC." [Brunsting Reply Dec. ¶ 11]
  - "The accounting policies and practices that give rise to QC's inability to certify its financial statements have been revised such that instances of material noncompliance with GAAP are not continuing and further do not affect GAAP compliance for transactions between QC and QLDC." [Schwartz Reply Dec. ¶ 11]
  - Tellingly, neither KPMG nor any accounting expert has endorsed or supported those bald assertions.

AT&T

QLDC Cannot Satisfy Section 272

- Professor William Holder, the Ernst and Young Professor of Accounting at the University of Southern California and a leading expert in the profession, has explained that Qwest's *ispi dixit* assertions cannot be taken seriously because:
  - Mere management representations are insufficient to establish GAAP-compliance; rather, hard accounting evidence is required.
    - Here, unlike other BOCs, Qwest has provided no evidence that QLDC's books have been audited and found to comply with GAAP
  - Qwest's accounting problems themselves are under review and Qwest has in place accounting policies that apply broadly throughout the Qwest family
  - Qwest's accounting problems are systematic and pervasive.
    - Qwest continues to announce new problems that are not related to the accounting of optical capacity swaps.
  - Qwest does not know the full extent of its accounting irregularities and will not know until the ongoing investigations conclude.
    - On November 15, 2002 Qwest again stated that cannot certify the accuracy of its financial statements, that it will not be able to do so until its internal investigation is completed, and that it does not know when that will happen

AT&T

QLDC Cannot Satisfy Section 272

- Further, as Professor William Holder has explained, accounting policies are clear that even once GAAP-compliant policies are put into place, they cannot be found to produce GAAP-compliant figures unless rigorous accounting **controls** are also put into place
  - Qwest has repeatedly acknowledged that its existing controls are inadequate, and, while it asserts that it is now in the process of developing new controls, it makes no claim that these controls have been adequately *tested*
  - In August, Qwest acknowledged that it would take "months" to complete the review of "internal controls." [August 20 Shaffer Letter at 2]
  - The authoritative accounting literature makes clear that controls cannot be relied upon until they have been rigorously tested. Management assertions that controls are adequate are insufficient.

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QWEST'S CONTINUING SECRET DEALS DISCRIMINATION

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QWEST'S HISTORY OF SECRET DEALS

- In Qwest I & II, Qwest was forced to abandon its claim that it had not engaged in discriminatory secret deals.
- Minnesota, Iowa and Arizona investigated Qwest's secret deals, and forced the filing of agreements.
- Qwest filed a request for a "declaratory ruling."
- Qwest filed some agreements that had previously been kept secret and "unfiled."
- Qwest aggressively but quietly began to terminate, restructure, and otherwise try to make its secret deals "not currently in effect" (to avoid disclosure).

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The Qwest III Application

- What has changed since Qwest I & II?
  - The Staff of the Colorado PUC has recognized *this very month* that the "secret agreements demonstrate the creation and sale of elements to certain parties but not others, which appears to be discriminatory, anti-competitive, violative of the letter and spirit of the Act, *and arguably contrary to Section 271 approval.*" [Colorado Staff Comments, Nov. 5, 2002 (CO PUC Docket Nos. 96A-287T, et. al)]
  - The Colorado PUC has *refused to approve* Qwest's secret agreements, recognizing the discrimination.

AT&T

Qwest's Secret Deals Are No "Trifle"

- Secret deals are still out there - 31 by AT&T's count, and at least five of the agreements Qwest does not even assert have been terminated.
- Qwest has made no demonstration of what arrangements were made to terminate deals or continue service.
- These deals, plus another 15, clearly contain terms that should have been available to AT&T for pick-and-choose purposes -- and still would be in effect for AT&T had it done so. Termination thus has not eliminated the past and present effect of the discrimination.

AT&T

Qwest's Oral Secret Deals Cannot Be Ignored

- Qwest's disregard for the regulatory requirement of nondiscrimination is also reflected in its refusal to accept and acknowledge responsibility for its entry into oral secret deals.
- In Minnesota and Arizona, the only two proceedings where factual investigations have been undertaken, these oral secret deals have been found to exist.
- The findings include the conclusion that the oral deals were "knowingly and intentionally" crafted to avoid the requirements of the Act, and to evidence disregard for the regulatory process, including the requirements of Sections 251, 252 and 271.
- Qwest's only answers are unpersuasive denials and unsupported claims that if they ever existed, they have been terminated.

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Qwest Seeks To Defer Review Of Its Conduct Until After It Has Received Its Reward

- The nine states have not completed sufficient review of the "secret deals" to ensure that Qwest is compliant with the checklist's requirement for nondiscrimination.

- In fact, with the exception of Iowa, all of these states have put off until other proceedings or put to the FCC the responsibility of evaluating the impact of the secret deals.

- And Iowa, unlike Arizona and Minnesota, has merely forced Qwest to file the agreements that Qwest itself recognizes should have been filed in Iowa. There has been no investigation into oral or other agreements, and no assessment of the impact of the secret deals on the records in the state's proceeding.

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Qwest' s New Discriminatory Tools

- Qwest is trying to use any ambiguity it can find to discriminate.
- Its newest refrain -- the agreement is a "settlement agreement offering a one-time payment for a backward-looking dispute" -- is nothing more than an effort to collapse discriminatory deals into present value payments.
- As the Minnesota PUC Chairman noted, the "evidence shows that the only struggle that was in Qwest's mind was how to violate the law and how not to get caught." [Minnesota Transcript, October 21, 2002, at 74].
- A grant of Section 271 relief will reward Qwest's strategy, and send a signal that the Commission really will not take serious action even when multiple instances of misconduct come to light.

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